Filed 12/30/04 P. v. Pardew CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JERRY DAN PARDEW, Defendant and Appellant.	D043413 (Super. Ct. Nos. SCD173030, SCD171694, SCD148507)

APPEAL from a judgment of the Superior Court of San Diego County, Frank A. Brown, Judge. Affirmed.

Jerry Dan Pardew appeals from a judgment convicting him of two counts of making a criminal threat. (Pen. Code, § 422.)[1] He asserts his second criminal threat conviction cannot be sustained because it is based on threats directed at an unintended victim. We reject this argument. As to sentencing, Pardew contends reversal is required

1 Subsequent statutory references are to the Penal Code, unless otherwise specified.

under *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531]. We reject this argument as well, and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2002, Gena Wahner was removing a dead bush from the front yard of an apartment complex that she managed. Pardew, who Wahner had seen in the neighborhood, began angrily yelling at her from across the street, saying things like "You fucking cunt, you're going to die. Do you hear me? For cutting up that tree." Wahner called the police and Pardew was arrested. On February 20, 2003, Pardew pleaded guilty to misdemeanor making a criminal threat and was placed on probation.

On February 21, 2003, Wahner and Dawn Longardino were sitting on Wahner's front porch. Pardew, who had just been released from jail because of the December incident, was at the liquor store across the street from Wahner's house. Pardew began angrily yelling Wahner's name and stating, "I'm going to kill you." In fear for her safety, Wahner dropped to the ground, crawled inside the house, and called 911. She could hear Pardew saying he would kill her, that bits of her blood would spill on the street, the skyline would be filled with her blood, and people like her were the reason San Diego is such a bad place.

Longardino remained on the front porch to monitor the situation. After Wahner was inside the house, Pardew continued to yell about spreading Wahner's blood across the skyline and shooting her. Pardew came across the street and up to the gate in front of the house. As he stood outside the gate, Pardew said Wahner's name and then continued on with his threats, repeatedly saying, "I'm going to kill you, you cunt." While he was

making these statements, he made eye contact with Longardino and aggressively shook his fists. Longardino was afraid and did not go to the gate for fear of a confrontation with Pardew. The police arrived and arrested Pardew. Pardew was verbally and physically aggressive as he was arrested.

After waiving jury trial, Pardew defended himself at a court trial. Pardew testified he had not seen Wahner or had any interaction with her on the day of the charged incident.

The court found Pardew guilty of two counts of criminal threats, one directed at Wahner and the other at Longardino. Pardew's probation was revoked for a previous conviction, and he was sentenced to serve four years and eight months in prison for the revoked probation and instant case.

DISCUSSION

I. CONVICTION

Pardew argues that his second criminal threat conviction, based on a threat directed at Longardino, must be reversed because the evidence conclusively establishes that he only intended to threaten Wahner, and that when he threatened Longardino he mistakenly thought she was Wahner.

Preliminarily, we reject this argument because the record contains sufficient evidence for the trier of fact to conclude that even if Pardew's primary target was Wahner, he also intended to threaten Longardino. Longardino testified that after Wahner went into the house, Pardew continued with his threats and stated, "'I'm going to kill you'" while looking directly at Longardino and making eye contact. Even though Longardino

testified that Pardew stated Wahner's name while continuing the threats, the trier of fact could infer that he also meant to encompass Longardino in the threats because he made threats directly to Longardino while making eye contact with her. The trier of fact was not compelled to infer that Pardew thought Longardino was Wahner.[2]

Secondly, even if the record is construed to show that Pardew subjectively intended to direct the threats only at Wahner, a conviction based on the threats he actually directed at Longardino was still proper. We are not persuaded by Pardew's argument that because the offense of criminal threats contains a specific intent element, a conviction cannot be sustained when a defendant directs threats at a third party who the defendant may mistakenly believe is the intended victim. The elements of the crime of criminal threat are: (1) the defendant willfully threatened to commit a crime which will result in death or great bodily injury to another person; (2) the defendant made the threat "*with the specific intent that the statement . . . is to be taken as a threat*, even if there is no intent of actually carrying it out"; (3) the threat was so unequivocal as to convey to the threatened person a gravity of purpose and an immediate prospect of execution; (4) the threat actually caused the threatened person to be in sustained fear; and (5) the threatened person's fear was reasonable. (§ 422, italics added[3]; *People v. Toledo* (2001) 26 Cal.4th

---

2 To support his argument, Pardew cites to the probation report submitted at sentencing, which states that Longardino told the authorities that she thought Pardew mistook her for Wahner because they look alike. The hearsay matters contained in the probation report are not part of the evidentiary presentation at the guilt phase of the trial.

3 Section 422 defines the crime as follows: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with

221, 227-228.) Although the statute requires that the defendant specifically intend that the statement be taken as a threat, it does not require that the person actually threatened by the defendant be the person the defendant intended to threaten. The elements of the crime are satisfied when the defendant specifically intends to, and does, issue an unequivocal threat, and a reasonable sustained fear is induced in the threatened person. There is nothing in the statute or interpretive case law lifting a defendant's culpability when the defendant issues a threat to a person who he thinks is someone else.

This interpretation based on the plain language of section 422 is consistent with its underlying purpose, which is to shield persons from the sustained infliction of fear. Section 422 is predicated on the notion that "every person has the right to be protected from fear and intimidation," and was enacted "in response to the growing number and severity of threats against peaceful citizens." (*People v. Martinez* (1997) 53 Cal.App.4th 1212, 1221.) When a defendant threatens a person, the threatened person is subjected to the "psychic violence"[4] proscribed by the statute regardless of who the defendant thinks the person is.

---

the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison. . . ."

4 *People v. Solis* (2001) 90 Cal.App.4th 1002, 1024.

Pardew's citation to *People v. Bland* (2002) 28 Cal.4th 313 and *People v. Calderon* (1991) 232 Cal.App.3d 930 does not assist his position. Those cases set forth the rule that the doctrine of transferred intent applicable in murder cases does not apply to attempted murder. (*People v. Bland, supra*, 28 Cal.4th at pp. 326-327.) In the context of murder, the transferred intent doctrine provides that when a defendant kills a bystander in lieu of, or in addition to, the intended victim, the defendant is guilty of the bystander's murder. (*Id.* at pp. 317, 320-326.) The state of mind transferred to the unintended victim includes not only express or implied malice, but also premeditation. (*Id*. at pp. 323-324.) Evaluating the logical underpinnings of the rule that a defendant is guilty of the murder of all victims, intended or unintended, who die as the result of the defendant's intent to kill any one person, the *Bland* court explained: "Whether one conceptualizes the matter by saying that the intent to kill the intended target transfers to others also killed, or by saying that intent to kill need not be directed at a specific person, the result is the same: assuming legal causation, a person maliciously intending to kill is guilty of the murder of all persons actually killed." (*Ibid*.) In contrast, the court in *Bland* held the transferred intent concept should not be applied to the inchoate crime of attempted murder, because "[t]he crime of attempt sanctions what the person intended to do but did not accomplish, not unintended and unaccomplished potential consequences." (*Id*. at p. 327.) Accordingly, *Bland* concludes "[t]o be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else." (*Id*. at p. 328.)[5]

---

5 The *Bland* court noted, however, that a defendant who attempts to kill can be

Bland's conclusion regarding attempted murder does not translate to criminal threats because criminal threats is not an inchoate crime. A defendant who intends to, and does, communicate an unequivocal threat to an unintended victim thereby inducing fear in the victim, has accomplished the crime of criminal threats. Pardew has not presented us with any reason why *Bland*'s holding regarding an inchoate crime should be extended to an accomplished crime.

II. SENTENCE

Pardew's sentence of four years, eight months was derived from (1) the revocation of his probation in a 1999 case where he pleaded guilty to sale of a controlled substance (Health & Saf. Code, § 11379, subd. (a), case number SCD148507), and (2) the instant case where he was convicted of two counts of criminal threats after a court trial (§ 422, case number SCD173030). The trial court selected the upper term of four years for the drug sale conviction as the base term, with the first criminal threats conviction to be served consecutively at one-third the middle term of two years (i.e., eight months), and

---

found guilty of an assault crime against an unintended victim. (*People v. Bland, supra*, 28 Cal.4th at p. 329.) Further, the court observed that in many cases, including the case before it, an attempted murder verdict vis-à-vis a bystander would be sustainable on a concurrent intent theory. That is, a fact finder could infer from the nature of the defendant's conduct (i.e., shooting into a group of people) that the defendant not only intended to kill the primary target, but also intended to kill other people in the vicinity. (*Id.* at pp. 329-331.) This latter analysis is consistent with our holding above that the record supports an inference that Pardew intended to threaten Longardino as well as Wahner.

the upper term of three years for the second criminal threats conviction to be served concurrently.[6]

Pardew argues the trial court's selection of upper terms violated the principles in *Blakely v. Washington, supra,* 124 S.Ct. 2531 (*Blakely*). In our analysis which follows, we first reject the People's argument that Pardew was required to obtain a certificate of probable cause in order to challenge the four-year upper term sentence for the drug sale conviction derived from his guilty plea. Second, as to the merits of the *Blakely* issue, we hold that *Blakely* is applicable to an upper term sentencing choice.[7] However, we conclude that no sentencing error occurred here because the court relied primarily on matters encompassed within the prior conviction exception to the *Blakely* rule.

Certificate of Probable Cause

In considering the People's claim that a certificate of probable cause was necessary to allow a challenge to the sentence derived from Pardew's guilty plea, we note preliminarily that Pardew's notice of appeal was filed *before* the *Blakely* decision was

---

6 Pardew was also given credit for time served for his misdemeanor criminal threats and battery convictions in case number SCD171694.

7 A split exists in this court on the applicability of *Blakely*. In *People v. George,* 122 Cal.App.4th 419, review granted December 15, 2004, S_____, this court found *Blakely* applicable to California's middle/upper term sentencing scheme. In *People v. Wagener* (2004) 123 Cal.App.4th 424, 433, a different panel of this court reached the opposite conclusion. We decline to follow *Wagener*. The issue of *Blakely*'s application to California's sentencing scheme is currently pending before the California Supreme Court. (*People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004, S126182.)

issued. Thus, Pardew did not know at the time of filing his notice of appeal that there was a constitutional sentencing issue pertinent to his guilty plea, and he could not have anticipated the need for a certificate of probable cause.

In any event, under the circumstances of this case, the People's certificate of probable cause argument fails on its merits. Although a defendant must obtain a certificate of probable cause to bring an appellate challenge to the validity of a guilty plea, no certificate is necessary to challenge a sentence which was not part of the plea bargain. (*People v. Buttram* (2003) 30 Cal.4th 773, 784-785.) The record shows that the plea bargain for the drug sale conviction was based on the district attorney's agreement to dismiss the balance of the charges and acquiescence to local time or the granting of probation. Although the plea agreement contains the standard advisement regarding the maximum possible sentence for the offense, the four-year maximum sentence was *not* an agreed-upon term of the bargain. This case is not in the same posture as the cases cited by the People, *People v. Cole* (2001) 88 Cal.App.4th 850, 858-859, 868 and *People v. Young* (2000) 77 Cal.App.4th 827, 830, 832, where *as part of the plea bargain* the defendant agreed to a certain maximum sentence, thereby precluding an appellate challenge to the constitutionality of the sentence in the absence of a probable cause certificate. Because Pardew's challenge to the four-year upper term does not seek relief from any term to which he agreed as a part of the plea bargain, it does not constitute an

---

We note that Pardew does not contend that the imposition of a consecutive sentence implicates *Blakely*. In any event, such an argument would be unavailing. (*People v. Jaffe* (2004) 122 Cal.App.4th 1559, 1589.)

attack on the validity of the plea and does not require a certificate of probable cause. Accordingly, we proceed to evaluate his *Blakely* challenge.

The Blakely Decision

In *Blakely,* the United States Supreme Court held the defendant's Sixth Amendment right to trial by jury was violated when, after the defendant pleaded guilty, a Washington sentencing court imposed an "exceptional" sentence that was three years beyond the state's "standard range" maximum for the crime. (*Blakely, supra,* 124 S.Ct. at pp. 2535-2538.) The exceptional sentence was based on the sentencing court's factual finding of an aggravated circumstance of deliberate cruelty. (*Ibid*.) *Blakely* applied the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, which provides: "'*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Blakely, supra*, 124 S.Ct. at p. 2536, italics added.) The *Blakely* court defined the "statutory maximum" as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Id.* at p. 2537.) That is, the test to determine the unconstitutionality of a sentence derived from factual findings by a sentencing court is whether the sentence is "*greater than what state law authorize[s] on the basis of the verdict alone*." (*Id*. at p. 2538, italics added.) The *Blakely* court did not, however, limit all fact-finding by a sentencing judge—rather, distinguishing determinate from indeterminate sentencing schemes, the court explained that a judge may impose a sentence based on additional facts as long as the sentence does not exceed the sentence to which the defendant has a *legal right* under

the state's statutory scheme. (*Id*. at p. 2540 [facts ruled upon by court under indeterminate scheme do not violate jury trial right because the facts "do not pertain to whether the defendant has a legal *right* to a lesser sentence"].)

Applicability of Blakely to Upper Term Sentences

Under California's determinate sentencing law, where a penal statute provides for three possible terms for a particular offense, the sentencing court is required to impose the middle term unless it finds, by a preponderance of the evidence, that the circumstances in aggravation outweigh the circumstances in mitigation. (§ 1170, subd. (b); Cal. Rules of Court,[8] rule 4.420.) Because this sentencing scheme *requires* selection of the middle term unless the court finds aggravating or mitigating circumstances, the middle term is viewed as the sentence to which the defendant is presumptively entitled. (*People v. Avalos* (1984) 37 Cal.3d 216, 233; *People v. Reeder* (1984) 152 Cal.App.3d 900, 924; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582-1583 ["midterm is statutorily presumed to be the appropriate term"].) Further, in order to avoid punishing the defendant twice based on the same fact, a fact that is an element of the crime or the basis of an imposed enhancement may not be used to impose the upper term. (§ 1170, subd. (b); rule 4.420(c), (d); *People v. Scott* (1994) 9 Cal.4th 331, 350.)[9] Thus, the upper term cannot be based on matters derived solely from the jury verdict or a guilty plea—that is, the elements of the crime and imposed enhancements.

---

8 Subsequent references to rules are to the California Rules of Court.

Although there are some differences between the Washington and California sentencing schemes, we conclude that for purposes of the core concerns set forth in *Blakely*, California's upper term sentencing scheme is comparable to the scheme evaluated in *Blakely*. The Washington sentencing court was authorized to impose an exceptional sentence based on a court finding of aggravating factors, which factors must be distinct from the elements of the crime used to compute the standard range sentence, and thus distinct from the matters encompassed within the jury verdict or guilty plea. (*Blakely, supra*, 124 S.Ct. at pp. 2535, 2537-2538.) Similarly, California courts are authorized to impose an upper term sentence based on a court finding of aggravating factors, which factors must be distinct from the elements of the crime and imposed enhancements encompassed within the jury verdict or guilty plea. In *Blakely*, the United States Supreme Court rejected the contention that the maximum term set forth in the exceptional sentence statute should be viewed as the statutory maximum, and instead concluded that the statutory maximum was the term set forth in the standard range statute, because the latter is the only sentence which may be imposed "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Id.* at p. 2537, italics omitted.)

Absent direction from the California Supreme Court or Legislature, we are compelled to apply *Blakely*'s holding here—i.e., the statutory maximum for an offense is not the upper term but rather is the middle term, because the latter is the presumptively

---

9 A court may utilize an enhancement to impose the upper term if it can, and does,

correct term and is the only term that does not require findings beyond the jury verdict or guilty plea to justify its imposition. Accordingly, because the upper term increases the penalty beyond the statutory maximum, it cannot be imposed unless it is based on the fact of a prior conviction, or facts found by the jury beyond a reasonable doubt or admitted by the defendant.

Analysis of Pardew's Sentence

Having concluded that *Blakely* is applicable to California's upper term, we consider Pardew's argument that the imposition of upper term sentences in his case requires reversal.

We reject the People's argument that Pardew has waived the issue by failing to raise an *Apprendi* objection to the trial court. As a federal court aptly stated, *Blakely* "worked a sea change in the body of sentencing law." (*U.S. v. Ameline* (9th Cir. 2004) 376 F.3d 967, 973, & fn. 2.) Prior to *Blakely*, it was widely assumed that the upper term was the statutory maximum within the meaning of *Apprendi.* (See, e.g., *In re Varnell* (2003) 30 Cal.4th 1132, 1142 [stating, without discussion, that upper term of three years was statutory maximum under *Apprendi*]; see § 18.) Pardew was not required to anticipate an extension of *Apprendi* to California's middle/upper term sentencing scheme. The pragmatic waiver rule of *People v. Scott, supra,* 9 Cal.4th at page 353, which applies to sentencing issues that could have been corrected by the trial court, does not apply here.

---

strike the enhancement. (Rule 4.420(c).)

We now turn to the merits of Pardew's sentence. In selecting the upper terms, the trial court referred to Pardew's lengthy criminal record depicted in the probation report. The court noted that Pardew's criminal record began in 1988 and continued until his recent offenses, involving conduct such as drug use and possession, harassment, resisting a police officer, trespassing, battery, petty theft, vehicle code violations, malicious mischief, assault, illegal lodging, disturbing the peace, and making criminal threats. The court acknowledged that Pardew may have sustained some brain damage from either drug use or past physical altercations. However, the court noted that Pardew's criminal record showed he was frightening people with his conduct, and concluded that he needed to be separated from society for a while. The court stated that his criminal record "in and of itself, indicate[d] that he can't function well in society," and noted that he committed more felonies while on probation.

Based on the trial court's statements of reasons, we are satisfied that the primary factors influencing its selection of upper terms were Pardew's numerous prior convictions and the fact that he was on probation when he committed a felony. (Rule 4.421(b)(2), (b)(4).) *Blakely* retains the rule that "'the fact of a prior conviction'" may be used to aggravate a sentence without a jury determination of this factor. (*Blakely, supra*, 124 S.Ct. at p. 2536.) We hold that the fact of probationer status at the time of the offense falls within the *Blakely* prior conviction exception because it is essentially analogous to the fact of a prior conviction.

We reach the same conclusion for a court's reliance on numerous prior convictions. The primary rationale for the prior conviction exception to the

Apprendi/Blakely rule is that the factor of *recidivism* has long been recognized as properly within the purview of a sentencing court rather than a jury, and thus the determination of whether a defendant has suffered a prior conviction need not constitutionally be submitted to the jury or admitted by the defendant. (See *People v. Thomas* (2001) 91 Cal.App.4th 212, 215-222.) When a court considers the *number* of prior convictions, it is making a determination based on recidivism. Furthermore, the factor of numerousness—which merely requires the court to *facially count* the number of prior convictions—does not require the court to engage in any fact-finding pertinent to the prior offense beyond what has already been determined by the jury or admitted by the defendant in the prior guilty verdict.

Because the factors of probation status and numerous prior convictions need not be found by a jury or admitted by the defendant, no *Blakely* error occurred here.

Alternatively, to the extent the trial court's statement of reasons suggests it may have given some consideration to matters arguably beyond the prior conviction exception (i.e., danger to society or increasing seriousness of offenses, see Rule 4.421(b)(1), (b)(2)), on this record we have no doubt the trial court would have relied solely on the numerous convictions/probation status factors had it been aware of the *Blakely* constraints. Accordingly, we find any *Blakely* error harmless even under the more stringent standard for federal constitutional error. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326 [applying harmless beyond a reasonable doubt standard to *Apprendi* error]; compare *People v. Price* (1991) 1 Cal.4th 324, 492 [reasonable probability of more favorable

outcome standard applies when sentencing court relies on both proper and improper reasons].)

DISPOSITION

The judgment is affirmed.

HALLER, Acting P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.